

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



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B  
P/S  
**75-1372**

To be argued by:  
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

-against-

ANDRE GONZALEZ,

Appellant.

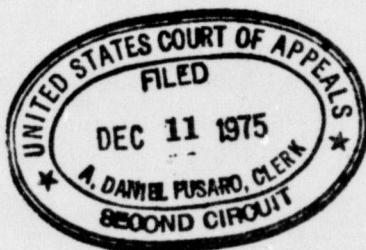
-----x  
Docket No. 75-1372  
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APPENDIX TO APPELLANT'S BRIEF

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ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,  
THE LEGAL AID SOCIETY,  
Attorney for Appellant  
ANDRE GONZALEZ  
FEDERAL DEFENDER SERVICES UNIT  
509 United States Court House  
Foley Square  
New York, New York 10007  
(212) 732-2971

RICHARD A. GREENBERG,  
Of Counsel.

**PAGINATION AS IN ORIGINAL COPY**

75CK 378

BARTELS, L.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.: CUNNINGHAM
(amended 6-26-75)	ANDRE vs. ---JOSE GONZALES	<b>CLOSED</b>
		For Defendant: _____
		Preminger, Meyer & Light 66 Court St., Bklyn, NY 834-8888

Did possess heroin

DATE	PROCEEDINGS
5/8/75	Before COSTANTINO, J. - Indictment filed
5/15/75	Before BARTELS, J. - Case called- Deft and counsel Jerome Matedero present Interpreter Margarita Mensa sworn- Deft waives reading of the Indictment by the Court(indictment read to deft by Interpreter)- Deft enters a plea of not guilty- Deft's motion for in camera inspection of Grand Jury minu by the Court - denied- Deft's motion for discovery - granted - Deft's mo tion for reduction of bail - granted - Bail set at \$10,000.00 surety ber status report set down for 6/24/75 at 9:30 A.M.
5-21-75	Before BARTELS J - case called - defts motion for reduction of bail argued - motion denied - status report set down for June 24, 1975 @ 9:30 am.
6-6-75	Govts Notice of Readiness for Trial filed

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
6-9-75	By Bartels J - Order filed for expert services(Investigator Frank Steiner)		
1/24/75	Before BARTELS, J.- Case called - Deft and counsel present-Deft counsel reports that deft has retained new counsel		
6-26-75	Before BARTELS J - case called - deft & counsel present - court orders Martin Light substituted in place of Jerome Matedero as atty for the deft - Order on stipulation signed - trial set down for 8-4-75 at 10:00 am - court orders indictment amended to read ANDRE GONZALES in lieu of JOSE GONZALES		
6-26-75	By BARTELS J - Order on stipulation filed the the firm of Preminger, Meyer & Light be substituted in place of Jerome Mattadero, as attorney for the deft.		
7/1/75	Voucher for compensation of counsel filed		
7-21-75	Letter filed dated July 17, 1975 from Jerome Matedero, counsel for deft re above voucher etc.		
8/4/75	Before BARTELS, J.- Case called- Deft and counsel present-Trial ordered and begun-Jurors selected and sworn-Trial cont'd to 8/5/75		
1/5/75	By BARTELS, J.- Order of Sustenance filed. (dated 8/5/75)		
8-5-75	Before BARTELS J - case called - deft & counsel present - trial resumed -Gvt rests - Deft rests - Jury retires for deliberation at 1:05 PMJury returns at 4:50 PM with a verdict of guilty on all 4 counts of the indictment - jury discharged - defts motion to set aside the verdict is denied - defts motion to dismiss the indictment is denied - trial concluded -.sentence adjd without date.		
8-8-75	Voucher for expert services filed.		
9-26-75	Before BARTELS J - deft & counsel Martin Light present - Interpreter Emil Rodriguez sworn - deft is sentenced for 5 years imprisonment on count 1 plus special parole term of 4 years; 5 years imprisonment on count 2 plus special parole of 4 years; 5 years on count 3 plus special parole term of 4 years; 5 years on count 4 plus special parole term of 4 years; to run concurrently with each other for a total of 5 years imprisonment and special term of 4 years. Court relieves Martin Light as counsel for the deft.		
9-26-75	Judgment & Commitment filed - certified copies to Marshal.		
9-26-75	Notice of Appeal filed without fee(Gonzalez)		
9-26-75	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.		
9-30-75	Certified copy of Judgment & Commitment retd and filed - deft. del. to Warden, MCC, NY.		

**CRIMINAL DOCKET**

DATE	PROCEEDINGS
10/24/75	Certified copy of Order received from court of appeals and filed- that record be docketed on or before 11/11/75
10/28/75	Stenographers Transcript dated 6/24/75 filed
11-11-75	5 stenographers transcripts filed (one dated May 15, 1975; one dated May 28, 1975; one dated Aug. 4, 1975; one dated Aug. 5, 1975 and one dated Sept. 26, 1975)

A TRUE COPY  
ATTEST  
DATED 11/11 1975  
LEWIS O'GEL  
CLERK  
BY Rae Sault  
DEPUTY CLERK

# 75CR 378

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- x  
UNITED STATES OF AMERICA : :

- against - : Cr. No.  
~~ANDREE~~  
~~JOSE~~ GONZALES, : (T. 21, U.S.C., §841(a)(1))

Defendant. : :

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D. N.Y.

----- x  
THE GRAND JURY CHARGES:

MAY 8 1975 ☆

COUNT I

TIME A.M.  
P.M.

On or about the 16th day of January 1975 within  
the Eastern District of New York, the defendant, ~~JOSE~~  
GONZALES, did knowingly and intentionally possess with in-  
tent to distribute approximately 26.45 grams of heroin a  
Schedule I narcotic drug controlled substance.

(Title 21, United States Code, Section 841 (a) (1)).

COUNT II

On or about the 16th day of January 1975 within  
the Eastern District of New York, the defendant, ~~JOSE~~  
GONZALES, did knowingly and intentionally distribute approx-  
imately 26.45 grams of heroin a Schedule I narcotic drug  
controlled substance.

(Title 21, United States Code, Section 841 (a) (1)).

COUNT III

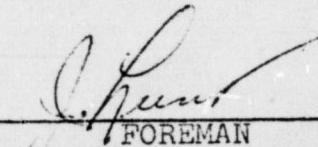
On or about the 5th day of March 1975 within  
the Eastern District of New York, the defendant, ~~JOSE~~  
GONZALES, did knowingly and intentionally possess with in-  
tent to distribute approximately 52.43 grams of heroin a  
Schedule I narcotic drug controlled substance.

(Title 21, United States Code, Section 841 (a) (1)).

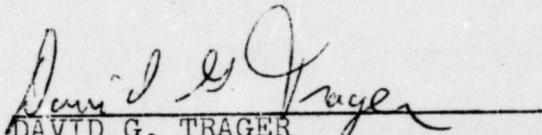
COUNT IV

On or about the 5th day of March 1975 within  
the Eastern District of New York, the defendant, ~~JOSE~~  
GONZALES, did knowingly and intentionally distribute ap-  
proximately 52.43 grams of heroin a Schedule I narcotic  
drug controlled substance.

(Title 21, United States Code, Section 841 (a) (1)).

  
\_\_\_\_\_  
C. F. Hunter

FOREMAN

  
DAVID G. TRAGER  
United States Attorney  
Eastern District of New York

## COURT CHARGE

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14           THE COURT: Ladies and gentlemen, you have listened  
15           most attentively to the testimony and to the summations.  
16           The testimony presents the facts and through the wit-  
17           nesses and exhibits as I outlined to you at the beginning  
18           of the case and the summations present the arguments of  
19           these attorneys, pro and con concerning those facts.

20           Now of course the time has come for you and me to  
21           perform our respective functions in the trial of this  
22           case. I noticed you have been very attentive. You  
23           have heard the voices of the attorneys and you have  
24           heard my voice and now your voice will be heard. I  
25           wish of course to extend to you my appreciation for

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2 your attentiveness and your alertness during the course  
3 of the trial and also my appreciation for any and all  
4 sacrifices which each and every one of you has made in  
5 your business or personal affairs in order to see that  
6 the ends of justice might be accomplished in this case.

7 You have been tolerant of the unavoidable delays  
8 and I noticed that all of you have been exceedingly  
9 interested in your task.

10 Every criminal prosecution is important to the  
11 Government of the United States and it is equally im-  
12 portant to the defendant on trial. Each is entitled  
13 to equal justice at your hands and from my experience  
14 justice is best dispensed of in a calm and patient and  
15 careful deliberate manner and I sincerely request you  
16 to keep that attitude throughout your deliberations  
17 when you go into your Jury room.

18 Of course you should always respect the viewpoints  
19 of your fellow jurors and you should talk to each other  
20 with consideration and with intelligence and decide the  
21 issues of this case on the merits and the merits alone.

22 However, each juror should reach his own conclu-  
23 sion and no juror should surrender or compromise his  
24 or her own belief or conviction as to the innocence or  
25 guilt of the defendant.

The evidence consists of the testimony of the witnesses and the exhibits admitted into the record. You have heard all the evidence and you have heard all the arguments of counsel and it becomes my duty now to give you the law governing this case and as both counsel said to you it is equally your duty to accept the law as it is given to you by the Court, whether you like it or not, and determine the facts of the case for yourself.

Now the proper application of the law to the case to the facts in the case as you find those facts to be will determine your verdict. I must emphasize again that the sole responsibility and the sole power in determining the facts are with you and anything that I may say or seem to say as to indicate any view or opinion as to the facts is to be completely ignored by you. In determining these facts you should not be influenced by any rulings that the Court may have made on the trial. Those rules simply deal with matters of law and not any questions of fact. And of course the Court's rulings on any objections made by either of these attorneys and any questions which the Court may impose to any witness are not to be considered by you as an indication of either guilt or innocence of the defendant or any opinion that the Court may have with respect thereto. And of

## 64 1 COURT'S CHARGE

2 course the same is true with respect to any inflection  
3 of the Court's voice relative to any such matter or in  
4 connection with any comments or statements the Court  
5 may have made to either of these attorneys.

6 It is very important that you must remember that  
7 you're going to decide the facts. The Court has nothing  
8 to do with that decision. You simply apply the law  
9 that the Court tells you is the law in the case to those  
10 facts. Now you may wonder why the Court asks witnesses  
11 certain questions from time to time. Now the reason  
12 was that some of the testimony raised some questions in  
13 the Court's mind. I of course felt that those questions  
14 might have also been raised in the minds of the Jury.  
15 So for the sake of clarity and for that only were those  
16 questions asked and they must not be deemed as any in-  
17 dication of any opinion that the Court may have in this  
18 case. The Court expresses no opinion as to the guilt  
19 or innocence of this defendant. The determination of  
20 such guilt or innocence is completely and exclusively  
21 with you.

22 Well, there are certain general principals of law  
23 which are of importance to every criminal case and I  
24 wish to first make some statements which apply to  
25 criminal cases in general after which I will endeavor

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2 to make clear to you what this particular case involves.

3 It is an established principal that an indictment  
4 is but a formal method of accusing a defendant of a  
5 crime. It is not evidence of any kind against the ac-  
6 cused and it does not create any presumption or permit  
7 any inference of guilt against this defendant. Now it  
8 is also a principal in the law that every person charged  
9 with the commission of a crime is presumed to be inno-  
10 cent and the burden rests upon the Government to prove  
11 to your satisfaction beyond a reasonable doubt every  
12 element of the crime in that the party is guilty as  
13 charged. This presumption of innocence remains with  
14 the defendant all through the case until, if it is ever  
15 over-born by proof which satisfys you beyond any rea-  
16 sonable doubt that the presumption of innocence no  
17 longer remains with him. Thus we look at the evidence  
18 introduced in this case and you ask yourselves whether  
19 or not you are satisfied beyond a reasonable doubt that  
20 the offenses have been committed as charged in the in-  
21 dictment. If you are so satisfied then it will be  
22 your plain duty to convict the defendant. But, if there  
23 exist in your minds a reasonable doubt as to this de-  
24 fendant's guilt, then you must give him the benefit of  
25 that doubt and acquit him. If there are two reasonable

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## 1 COURT'S CHARGE

2 conclusions equally supported by the evidence, one of  
3 which is consistent with the guilt of the defendant and  
4 one is consistent of innocence of the defendant then  
5 you must adopt the conclusion consistent with the inno-  
6 cence of the defendant and acquit him.

7 The question of reasonable doubt is one which can  
8 be determined only by you. It cannot be determined by  
9 arguments of counsel and in reaching this conclusion  
10 with respect to reasonable doubt you must consider all  
11 of the evidence together. Not just any particular seg-  
12 ment or any particular portion of the evidence isolated  
13 from the rest of the evidence.

14 The term reasonable doubt as used in this charge,  
15 ladies and gentlemen, does not mean just any possible  
16 doubt that you might have, but it means such a reasonable  
17 doubt as a careful and prudent and reasonable man or woman  
18 ought to entertain in the circumstances. It means a  
19 doubt which is as indicated, is based on reason and  
20 which is reasonable in view of all the evidence here.  
21 The key word is reasonable.

22 Now reasonable doubt may arise from the evidence  
23 produced or from the lack of evidence in the case. It's  
24 the obligation of the Government to prove a defendant  
25 guilty beyond a reasonable doubt but it is not the ob-

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## 1 COURT'S CHARGE

2        ligation of the Government to prove a defendant beyond  
3        a shadow of a doubt. It is impossible to prove anything  
4        to an absolute certainty all beyond all possible doubt.  
5        It is practically impossible for a person to be absolutely  
6        sure and convinced of any controverted fact which, by  
7        its nature is not susceptible of mathematical certainty.  
8        A reasonable doubt does not mean a mere whim or imaginary  
9        doubt, nor does it mean a possible doubt created by a  
10      reluctance on the part of the juror to perform an un-  
11      pleasant task. It means a doubt arising out of the evi-  
12      dence or lack of evidence which is a reasonable doubt.  
13      Now a reasonable doubt is a doubt that would cause a  
14      prudent man to hesitate to act in matters of importance  
15      to themselves. Now if a fair and impartial consideration  
16      of all the evidence or lack of evidence you have a rea-  
17      sonable doubt as to this defendant's guilt, then it is  
18      your duty to acquit him. On the other hand if after a  
19      fair and impartial consideration of all the evidence you  
20      believe that you have no doubt that is reasonable as to  
21      this defendant's guilt, then it is your plain duty to  
22      convict him. One is said you have to be convinced in  
23      a case of this kind beyond a reasonable doubt, when after  
24      a fair and impartial comparison and consideration of all  
25      the evidence one can conscientiously, he or she is con-

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3                   vinced to a moral certainty of the proof of the charge.  
4                   Thus you look at all the evidence introduced and you ask  
5                   yourselves whether or not you are satisfied beyond a  
6                   reasonable doubt that the offenses have been committed  
7                   as charged in the indictment. If you are so satisfied  
8                   as I said before, then it will be your plain duty to  
9                   convict this defendant. But, if there exists in your  
10                  mind a reasonable doubt as to this defendant's guilt,  
11                  of course you must give him the benefit of that doubt  
12                  and acquit him.

13                 Now the machine of trial calls for exercise of  
14                 varying functions of counsel by the witnesses who testi-  
15                 fy, by the Court and the jury. You as the jurors  
16                 will exercise the fact-finding function as I told you  
17                 before and you will be the sole judges of the facts.  
18                 You consider all the evidence, weigh the evidence  
19                 and you draw the inferences from the evidence but only  
20                 from the evidence. You must distinguish between mere  
21                 arguments of counsel which have been made before you  
22                 and the evidence upon which those arguments are  
23                 based. However, arguments do not constitute evidence.  
24                 You must carefully analyze the assertions which have  
25                 been made to you by counsel for the defendant and also  
                    by the Government and ascertain what basis there is

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2 COURT'S CHARGE  
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4 for these assertions. Now this brings us directly to  
5 the charges in this indictment which I will read just  
6 for the sake of clarification.  
7

8 Count 1 of the indictment says that on or about  
9 the 16th day of January, 1975, within the Eastern  
10 District of New York, the defendant Andres Gonzalez did  
11 knowingly and intentionally possess with intent to  
12 distribute approximately 26.45 grams of heroin, a  
13 Schedule 1 narcotic drug controlled substance in viola-  
14 tion of Title 21, United States Code 841(a)(1).  
15

16 Count 2 states that on or about the 16th day of  
17 January, 1975, within the Eastern District of New York,  
18 the defendant Andres Gonzalez did knowingly and inten-  
19 tionally distribute approximately 26.45 grams of heroin,  
20 a Schedule 1 narcotic drug controlled substance in viola-  
21 tion of Title 21, United States Code, Section 841(a)(1).  
22

23 Now we go to March 5th.  
24

25 Count 3 says, on or about the 5th day of March,  
26 1975 within the Eastern District of New York, the  
27 defendant Andres Gonzalez dia knowingly and intentionally  
28 possess with intent to distribute approximately 52.43  
29 grams of heroin, a Schedule 1 narcotic controlled drug  
30 in violation of Title 21, United States Code 841(a)(1).  
31

32 That brings us to Count 4 which is the last count.  
33

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2 It says, on or about the 5th day of March, 1975, within  
3 the Eastern District of New York, the defendant Andres  
4 Gonzalez did knowingly and intentionally distribute  
5 approximately 52.43 grams of Heroin, a Schedule 1 nar-  
6 cotic drug controlled substance in violation of Title 21,  
7 United States Code 841 (a) (1).

8 Thus, you see in effect these two transactions are  
9 covered by four counts because the mere possession with  
10 intent to distribute Heroin or Cocaine is an offense.  
11 The distribution or sale as the case may be is also an  
12 offense and therefore there are four counts in the in-  
13 dictment and you must consider each count separately  
14 and you must also consider the evidence against the de-  
15 fendant separately as to each count.

16 Now this brings us to the statute which is allegedly  
17 violated. As set forth in this indictment, Section 841  
18 of Title 21 of the United States Code claims to have been  
19 violated in all four counts of the indictment and it  
20 reads as follows. Except as authorized by this subchapter  
21 it shall be unlawful for any person knowingly or inten-  
22 tionally 1, to distribute or to dispense or possess  
23 with intent to distribute or dispense a controlled sub-  
24 stance.

25 Now of course without more you wouldn't know what

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3 a controlled substance is. So we have to look back to  
4 the provisions of the statute which describe a controlled  
5 substance.

6 A controlled substance as used in this statute is  
7 nothing more than a drug or substance mentioned in one  
8 of the schedules which are set forth in Section 812  
9 of Title 21 of the United States Code. Heroin is set  
10 forth in Schedule 1 of that section. Consequently or  
11 in other words that statute provides that it is unlaw-  
12 ful to possess with intent to distribute or the unlaw-  
13 ful distribution of heroin with knowledge that it is  
14 heroin. It is also to be noted that the provision in  
15 this statute is not limited to the sale of heroin, but  
16 prohibits possession with intent to distribute any  
17 amount of heroin, even though small, if possessed with  
18 the intent to distribute.

19 Consequently one may violate the statute by knowing  
20 and intentionally possessing with intent to distribute  
21 any amount of heroin.

22 Now referring to the illegal possession with intent  
23 to distribute a controlled substance such as heroin as set  
24 forth in Count 1 and I think 3 of the indictment, Sec-  
25 tion 841(a)(1), Title 21 of the United States Code  
provides that it shall be unlawful for any person know-

## 1 COURT'S CHARGE

2                 ingly and intentionally to possess with intent to dis-  
3                 tribute a controlled substance such as heroin. I'm just  
4                 now talking about the possession of Heroin not the  
5                 distribution.

6                 Now the elements of the offenses as set forth in  
7                 Count 1 as charged in Count 1 and 3 of the indictment  
8                 are, 1. That the defendant possessed a narcotic  
9                 controlled substance such as heroin with intent to  
10                 distribute the same and 2. That he did so intentionally,  
11                 willfully and knowingly.

12                 In other words he has to know that he had heroin.  
13                 If he didn't know what it was, if it was another matter,  
14                 you decide that what the evidence shows in this respect.

15                 Now the burden is upon the Government to prove  
16                 beyond a reasonable doubt to both of these elements and  
17                 the failure to prove either would be fatal to the pro-  
18                 secution and will entitle the defendant to a verdict of  
19                 acquittal on that particular charge.

20                 Now let us go to the other counts. Referring to  
21                 unlawfully, willfully and knowingly distributing a con-  
22                 trolled substance such as heroin.

23                 Hydrochloride as set forth in Count 2 and 4 of  
24                 the indictment, Section 841(a)(1) of Title 21 of the  
25                 United States Code provide that it shall be unlawful

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2 for any person knowingly or intentionally to distribute,  
3 such as a sale is distribution, a controlled substance such  
4 as Heroin hydrochloride. Now the elements of the offense  
5 as charged in Counts 2 and 4 of the indictment are 1.  
6 That the defendant distributed a narcotic controlled sub-  
7 stance such as Heroin hydrochloride and 2. That he did  
8 so knowingly and willfully.

9 The burden is upon the Government to prove beyond  
10 a reasonable doubt both of these elements and the fail-  
11 ure to prove either is fatal to the prosecution and  
12 entitles the defendant to a verdict of acquittal.

13 You must of course as I said before consider each  
14 count separately.

15 Well, let's talk a minute or two about intent and  
16 knowledge because that must be established in order to  
17 find that an offense has been committed.

18 The crimes charged in the indictments require  
19 knowledge and intent to commit the crimes.

20 Now obviously it is impossible to ascertain or  
21 prove directly what a man knew or what he intended.  
22 You cannot look into a man's mind and see what his in-  
23 tentions were or what he knew. But a careful considera-  
24 tion of the facts and circumstances shown by the evi-  
25 dence in any given case as to a particular person's ac-

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## 1 COURT'S CHARGE

2 tions and statements enables us to, with a reasonable  
3 degree of accuracy know what his intentions were in  
4 doing or not doing certain things and what his state  
5 of knowledge was.

6 You cannot look into one's mind and ascertain  
7 knowledge. Knowledge and intent are descriptive of a  
8 state of mind and is not susceptible of direct proof.  
9 The proof of this element of knowledge and intent may  
10 rest on and frequently does evidence of facts and evi-  
11 dence of certain circumstances so in which it clearly  
12 appears as the only reasonable logical inference that  
13 a particular person or defendant knowingly and inten-  
14 tionally possessed with intent to distribute a quantity  
15 of heroin or actually distributed and sold a quantity  
16 of heroin knowing that it was heroin. In determining  
17 this knowledge and intent you may consider the intelli-  
18 gence or sophistication or lack of intelligence or  
19 sophistication of a particular person. Of course no  
20 person can intentionally avoid knowledge by closing his  
21 eyes to the fact that would lead a reasonable man to  
22 investigate. However, mere suspicion that something  
23 is wrong or improper is not equivalent to knowledge or  
24 intent. On the other hand the knowledge or intent may  
25 be inferred from the acts of the parties and is a ques-

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## 1 COURT'S CHARGE

2                      tion of fact to be determined from all the circumstances  
3                      and the Jury may scrutinize the defendant's conduct at  
4                      the time that the offenses were alleged to be committed.  
5                      No person can disclaim knowledge by merely closing his  
6                      eyes in which otherwise would have been obvious to a  
7                      reasonable man. I am not going to attempt to outline  
8                      any of the evidence in this case because it is exceed-  
9                      ingly short and you will remember the testimony of the  
10                     witnesses. I think you had three witnesses, that's  
11                     all. So I won't make any effort to refer to their tes-  
12                     timony. You will remember that testimony. Perhaps  
13                     much better than I would in all events.

14                     Anyway, I want to make it clear to you it is your  
15                     remembrance and your recollection of the testimony that  
16                     counts. That anything that I may have stated at any  
17                     time with respect to any of the testimony of the facts  
18                     is to be completely ignored by you because I will re-  
19                     peat I have no opinion whatsoever as to innocence or  
20                     the guilt of this defendant.

21                     Now the defendant by his plea of not guilty com-  
22                     pletely denies his guilt with respect to the allegations  
23                     set forth in the indictment. He denies completely those  
24                     transactions which I have read to you and as described  
25                     in the indictment.

2 Now the defendant did not take the stand, but the  
3 law doesn't compel a defendant to take the witness stand  
4 and testify and no presumption of guilt may be raised  
5 and no inference of any kind may be drawn from the fail-  
6 ure of the defendant to testify. Nor should this fact  
7 enter into your discussions or deliberations in any  
8 manner whatsoever.

9 Also the law does not require the prosecution to  
10 call as a witness all the persons who may have been  
11 present at any time, place or involved in the case or  
12 may appear to have some knowledge of the matters in  
13 issue in this trial. Therefore this case rests upon  
14 direct evidence and therefore I will not refer to or  
15 give you instructions as to circumstantial evidence  
16 unless hereafter you require it because I don't believe  
17 there is a question of circumstantial evidence.

18 Now the important issue here I believe rests upon  
19 the credibility of the witnesses and considering the  
20 evidence you're going to have to exercise your exclu-  
21 sive function of passing upon the credibility of the  
22 witnesses. You can see this is a very important func-  
23 tion because determining where the truth is is a neces-  
24 sity to decide, whether or not the witnesses were tel-  
25 ling the truth. How are you going to do this. This is

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going to be left to your own determination. In determining the credibility of a witness a juror may consider his motives in testifying, his or her manner and demeanor on the witness stand. His interest, his prejudices his biases if any and whether he has a purpose to serve which might or might not have colored his testimony. Interest does not necessarily mean that a witness is untruthful. It's merely an element you may consider in reaching a determination upon the question of whether or not he is telling the truth. You consider the witness' demeanor when he gets on the witness stand. To use a colloquial expression, you size him up, look him over as they say and decide how he strikes you as a fair and candid witness. Whether he strikes you as a person who is not telling the truth for some reason or another. You may consider this witness' intelligence. You can consider his state of mind. His ability to observe the matters to which he has testified and whether he impresses you as having a fair and accurate recollection of those matters. You can consider the inherent probabilities or improbabilities of a witness' testimony. Another consideration is whether or not the witness has been contradicted by other credible witnesses or whether or not he has made some statement at other times and

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2 places under oath that are otherwise contradicted or  
3 contrary to those made by him on the witness stand.

4 Of course when you have an inconsistent statement or a  
5 conflict you must determine whether it relates to a  
6 material or essential portion of his testimony or it  
7 refers to an immaterial or unimportant detail of his  
8 story. You decide what is important and what is not  
9 important, regardless of any statement made to you by  
10 counsel.

11 Of course a juror is not bound to believe an in-  
12 herently improbable or unreasonable statement made by any  
13 witness just because the witness happens to be under  
14 oath. The Jury has a right in appraising a particular  
15 witness' credibility as to all or part of his testimony  
16 to consider the probability or improbability of that  
17 testimony when viewed in the light of all circumstances  
18 and in the light of any other evidence in the case.

19 Now we have as you remember a person by the name of  
20 Robert Henderson. He was an expert.

21 Now the rules of evidence ordinarily do not per-  
22 mit witnesses to testify as to opinions or conclusions.  
23 An exception to this rule exists as to those whom we  
24 call expert witnesses. Witnesses who by education or  
25 experience have become expert in some art or science

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2 or professional calling. They are allowed to state an  
3 opinion as to a relevant and material matter which they  
4 profess to be an expert and they may also state their  
5 reasons for the opinion. Of course you can consider  
6 each expert's opinion received in evidence, you give it  
7 such weight as you may think it deserves and you decide  
8 what that is and if you decide that an opinion is one  
9 not based upon the profession, education or if the rea-  
10 sons given to support the opinion are not sound, you  
11 may reject that opinion completely. You will recall  
12 that Robert Henderson was called as an expert to testi-  
13 fy as to the analysis he made of a substance, allegedly  
14 purchased from the defendant on two different occasions  
15 and you will recall that he testified he made this  
16 analysis and he found that it was Heroin.

17 Now you can accept that testimony or you can re-  
18 ject it. It is up to you. It will be for you to  
19 determine whether a witness, whoever he is is telling  
20 the truth as to all the facts or only with respect to  
21 some of the facts or whether he is telling the truth  
22 at all. A test of whether you believe a witness is  
23 the same test that you ladies and gentlemen would apply  
24 in your everyday business or home affairs when you are  
25 called to make a similar type determination from time

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2 to time. You must not think, members of the Jury, when  
3 you came into this Jury box as sworn jurors you are  
4 suppose to lie aside your everyday experiences. That is  
5 not so. Indeed you are now being called upon to use  
6 that business or everyday experience to assist you in  
7 determining who or whether or not a particular witness  
8 is telling the truth. You're to be the exclusive judges  
9 in determining where the truth lies.

10 Now you have been chosen as sworn jurors in this  
11 case to try the issues presented by the allegations in  
12 the indictment and it is denied by the not guilty plea  
13 of this defendant. Your verdict will be without pre-  
14 judice and without bias and without sympathy. You are  
15 the fact finding body and it is your duty to decide  
16 whether the acts charged in the indictment have been  
17 committed by this defendant beyond a reasonable doubt.  
18 You are to perform this duty without fear or without  
19 bias or without prejudice to any party. The law does  
20 not permit jurors to be governed by fear or by bias  
21 or sympathy or prejudice or by public opinion.

22 In arriving at your decision you should consider  
23 the evidence in light of your own experiences and by  
24 the exercise of your own knowledge and common sense.  
25 You must not permit any sympathy to enter your view or

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2 public opinion. You will carefully and impartially con-  
3 sider all the evidence and you will follow the law as  
4 stated by the Court and you will reach a just verdict,  
5 regardless of the consequences. I will just say one  
6 other statement about your recollection of the evidence,  
7 because it is your recollection of the evidence that  
8 will count. It's not anything that I have said that  
9 should have any bearing on your determination as to  
10 what the evidence shows. If an attorney or either of  
11 them have mis-stated any testimony you must disregard  
12 those mis-statements. It is your recollection of the  
13 testimony that is going to control in your deliberations.  
14 In conclusion I would say that it is your duty to weigh  
15 this evidence dispassionately, carefully and calmly and  
16 to reach a conclusion about this case as to the facts  
17 which are wholly within your findings. The only question  
18 for your consideration whether this defendant is guilty  
19 or innocent of the offenses for which he is now on  
20 trial.

21 If you are satisfied beyond a reasonable doubt  
22 that he is guilty, it is your plain duty to convict him.  
23 On the other hand if you have a reasonable doubt about  
24 the matter it is equally plain your duty to acquit him.

25 The punishment provided by law if the defendant is

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2 found guilty is a matter exclusively within the province  
3 of the Court. You cannot and you should not allow con-  
4 sideration of any punishment which may be imposed upon  
5 this defendant if he is found guilty, to influence you  
6 in arriving at an impartial verdict as to the guilt or  
7 innocence of the defendant.

8 It is for the Court to determine the mitigating  
9 or other special circumstances which I will consider in  
10 the case if the defendant is found guilty. So you should  
11 not be concerned with the question of punishment.

12 Now ladies and gentlemen, all 12 of you must  
13 agree whichever way you find. In other words your ver-  
14 dict must be unanimous. Take each count of the indict-  
15 ment separately and you must determine the guilt or  
16 innocence of this defendant with respect to each count.

17 The form of your verdict should be, "We the Jury  
18 find the defendant Andres Gonzalez not guilty on  
19 Count 1," or, "We the Jury find the defendant Andres  
20 Gonzalez guilty on Count 1," and thus you repeat this  
21 procedure as to the other three counts and you will  
22 return a verdict of guilty or not guilty on each count  
23 with respect to this defendant.

24 Now if you wish, if you wish any of the testimony  
25 of any of the witnesses to be read to you or if you have

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any further questions, please send in a note to the  
marshal who will relay your request to me. Now, I  
know jury service is not always pleasant and quite fre-  
quently it is very inconvenient, but jury service is one  
of the keystones of our system of American justice in  
a democratic form of government. I want to thank you  
again for your devotion as citizens to this important  
work as jurors and acting in accordance with the evidence  
and with the laws as I have charged you by your verdict  
declare the truth and proclaim the cause of righteous-  
ness and justice in this case. If you desire to examine  
any of the exhibits they will be delivered to you upon  
request if after you retire you desire to be informed  
on any point of law arising in this case or to have any  
part of the testimony clarified or should you ask to  
be returned to the Courtroom, you should then ask to be  
returned to the Courtroom for further instructions.

Now at this point I have to take five minutes in  
order that I may hear applications to be made by counsel.  
It will be a very, very short five minute recess. I  
request you do not consider this case until you go back  
into the Jury room at the end of the break. In other  
words, you are not free to talk about the case yet.  
You're very close to it, but not yet and I will take

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2 this opportunity to discharge the alternates. I will  
3 thank you very much. They are an assurance against a  
4 sickness or a failure of jurors who have not shown up.  
5 Thank you very much. We'll ask the Jury then to go to  
6 the Jury room.

7 (Jury excused.)

8 THE COURT: What do you say gentlemen, on the  
9 record, do you have any requests, objections, exceptions?

10 MR. CUNNINGHAM: No, Your Honor.

11 MR. LIGHT: Very nice charge.

12 THE COURT: Call them back.

13 (Jury enters box.)

14 THE COURT: Well ladies and gentlemen, there are  
15 no further instructions for me to give you and you may  
16 now return to your Jury room and immediately begin  
17 deliberating upon the issues involved.

18 Your lunch will be here I'm told within the next  
19 10 or 15 minutes at the most. But you need not wait  
20 for your lunch to deliberate. You may begin immediately.

21 (Whereupon, the Jury retired to deliberate at  
22 1:08 P.M.)

23 (Whereupon, the United States Marshal was sworn  
24 to guard the Jury.)

25 (Jury excused.)

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just5

(At 2:50 p.m., the following occurred without the presence of the jury.)

8                   That Mr. Light, although knowing what I had  
9                   told him and to come over from 16 Court Street,  
10                  which is five or ten minutes away, the most, he has  
11                  not yet appeared at five minutes to three.

At one time he was willing to waive, at least  
he told the Deputy Courtroom Clerk, that he would  
waive being present at the hearing of the testimony,  
or the reading of the testimony.

Now, everyone is here and ready, we are ready  
to read that testimony, but Mr. Light is still not  
present.

I just want the record to show that fact.

20 All right.

21 Let us see, Court's Exhibit 2, jury note  
22 requesting portions of Mr. Balmer's testimony to be  
23 read back.

24 (At this point, Mr. Light entered the  
25 courtroom.)

1 THE COURT: It is now five minutes to three.

2 You know, you can't waste our time here, you

3 will stay here until there is a verdict rendered.

4 I'm not going to be put to this inconvenience and

5 neither should twelve jurors.

6 Now, call the jury in.

7 (The jury then took its place in the jury box.)

8 THE COURT: I have a note here from the jury

9 which reads:

10 "We would like to have the part of

11 Mr. Balmer's testimony dealing with the obtaining of

12 Mr. Gonzalez' driver's license."

13 We have been able to find it and the reporter  
14 will read it to you.

15 Do you mind reading it, Mr. Karr?

16 (At this point, the reporter read the

17 testimony dealing with the obtaining of a

18 driver's license for the defendant.)

19 THE COURT: Is that enough?

20 THE FOREMAN: That is enough.

21 THE COURT: Thank you very much, ladies and  
22 gentlemen.

23 (At 3:20 o'clock p.m., the jury left the  
24 courtroom to continue its deliberations.)

25

1                   THE COURT: The jury will leave now.

2                   (AT 6:00 o'clock p.m., the jury left the  
3                   courtroom.)

4                   THE COURT: Yes?

5                   MR. LIGHT: Your Honor, I am familiar of case  
6                   law in the State, I am not up-to-date with Federal,  
7                   but when an informant is present and makes an  
8                   introduction and partakes in a conversation relative  
9                   to the purchase of drugs, then his identity has to  
10                  be disclosed and the defendant has the right to call  
11                  him as a witness if he so desires.

12                  THE COURT: I don't know whether there are  
13                  cases to that effect.

14                  MR. CUNNINGHAM: I never heard of that.

15                  THE COURT: I never heard of that.

16                  MR. CUNNINGHAM: I do know, your Honor,  
17                  during the purchase and sale, the informant was never  
18                  present when there was a purchase and sale, only  
19                  present during the introduction.

20                  MR. LIGHT: But they discussed narcotics.

21                  MR. CUNNINGHAM: That is perfectly fine.

22                  THE COURT: That is perfectly all right.

23                  MR. LIGHT: Well --

24                  THE COURT: As a matter of fact, you will  
25                  recall in a recent decision of the Court of Appeals

1 it stating that where an informant testifies you  
2 may exclude the public; it shows that an informant  
3 has certain rights to be protected.

4 I see no reason why the testimony of the  
5 informant is necessary in any way to preserve the  
6 defendant's rights.

7 If you can point out to me that it is  
8 absolutely necessary, I will certainly see that  
9 there is every effort made to bring him in. But  
10 from the mere introduction of this man, and he  
11 cannot testify to a purchase, I think it is just  
12 petty fogging.

13 MR. LIGHT: It goes to more than that, this  
14 witness testified --

15 THE COURT: Wait, he has a verdict.

16 Do you have a verdict?

17 MR. CUNNINGHAM: Yes, your Honor.

18 THE COURT: All right, we will be through  
19 very shortly.

20 MR. LIGHT: Judge, this witness testified  
21 that the first time he ever heard the name Andres  
22 was this morning or yesterday, he didn't hear from--

23 THE COURT: Unless you give me cases, I'm  
24 not going to take it.

25 MR. LIGHT: Judge, can I just finish? I am

1 presoring the right of the defendant.

2 THE COURT: You continue to argue after the  
3 Court has ruled.

4 I think this is only a certain amount of  
5 petty fogging that goes on to delay the case.

6 I have ruled, I see no reason unless you give  
7 me precedents and show that it is necessary for this  
8 man's testimony. Whatever has already gone forward  
9 is not proof, and you are not going to argue with me--

10 MR. LIGHT: Judge, his testimony shows that.

11 THE COURT: I know, but that is not proof --

12 MR. LIGHT: Okay.

13 THE COURT: That is argument.

14 MR. LIGHT: That is not argument, I just want  
15 to preserve the record, I want to preserve it.

16 THE COURT: I know the proof as well as you,  
17 I heard it.

18 MR. LIGHT: If the case goes up to the Court  
19 of Appeals, the Court of Appeals hasn't heard it  
20 because you won't permit me --

21 THE COURT: The Court of Appeals, the Court  
22 of Appeals?

23 MR. LIGHT: They go by the record in this  
24 court.

25 THE COURT: Your argument is zero.

1 MR. LIGHT: Okay, sir.

2 THE COURT: You are arguing it, it is in the  
3 record.

4 MR. LIGHT: But if you don't let me put it on  
5 the record --

6 THE COURT: There is nothing to put on the  
7 record, any facts, on the record.

8 You are just skipping around, again and again  
9 and again, it is like going on a merry-go-round or  
10 a carrousel.

11 I know what the testimony is here and unless  
12 you can bring in some evidence or some cases --  
13 wait a minute, I don't know what Mr. Cunningham is  
14 doing, I'm arguing with you -- maybe you are right,  
15 maybe we had better bring him in.

16 You give me cases, both of you.

17 MR. CUNNINGHAM: As far as supplying a  
18 confidential informant's name?

19 THE COURT: Yes.

20 MR. CUNNINGHAM: May I make one statement for  
21 the record?

22 Let the record indicate that defense counsel  
23 was given the entire Gonzalez file, every document  
24 known to the Government was handed to him.

25 MR. LIGHT: I asked him to make photostats,

1 he wouldn't let me.

11 2 THE COURT: We have no such trouble with  
3 other lawyers, let the record show that.

4 Now, you are not fooling anybody, you are just  
5 fooling yourself.

6 MR. CUNNINGHAM: You could have made all  
7 the notes you wanted to.

8 THE COURT: Very well, gentlemen, tomorrow  
9 morning.

10 (At 6:10 o'clock p.m., a recess was taken.)

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CERTIFICATE OF SERVICE

December 11, 1975

I certify that a copy of this brief and appendix  
has been mailed to the United States Attorney for the  
Eastern District of New York.

Richard A. Greenberg